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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1512

TERRY BROWN, ARLENE CIRELLI, PATRICK O'HEARN, and BOB YOUNG,

Petitioners,

—v.—

NEW MEXICO *ex rel.* A. L. HAPPY APODACA, A. L. HAPPY APODACA, DAVID L. NORVELL, Attorney General of the State of New Mexico, and BETTY FIORINA, Secretary of State of the State of New Mexico,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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Petitioners,

—v.—

NEW MEXICO *ex rel.* A. L. HAPPY APODACA, A. L. HAPPY APODACA, DAVID L. NORVELL, Attorney General of the State of New Mexico, and BETTY FIORINA, Secretary of State of the State of New Mexico,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Petitioners respectfully pray that a writ of certiorari issue to review the orders of the Supreme Court of the State of New Mexico entered in this proceeding on April 13, 1972, which denied the petitioners leave to intervene in *New Mexico ex rel. Apodaca* v. *Fiorina*, and to review the final judgment of that court in that case entered on April 17, 1972, which upheld New Mexico's system of filing fees for candidates in primary elections.

Opinion Below

In denying intervention to petitioners, the Court below wrote no opinion. The orders denying intervention are set out in the Appendix, *infra*, pp. 13-16. The opinion of the Court below in *New Mexico ex rel. Apodaca* v. *Fiorina* is not yet reported. The opinion and the Order Making Alternative Writ of Mandamus Absolute are set forth in the Appendix to the Jurisdictional Statement filed this day in *Norvell* v. *New Mexico ex rel. Apodaca*, No. 71-——, pp. 1a-21a.

Jurisdiction

The orders of the New Mexico Supreme Court were entered on April 13, 1972, and the judgment on April 17, 1972. Petitioners filed their Notice of Appeal on April 18, 1972. The jurisdiction of this Court to review those orders and that judgment is based on 28 U.S.C. §1257(3).

Statutory Provisions Involved

New Mexico Statutes Annotated

§3-8-26 Primary Election Law—Filing fees.—The filing fee for each of the following offices is:

> A. All officers receiving salary—6% of the first year's salary. . . .

Questions Presented

(1) Whether the Supreme Court of New Mexico deprived petitioners of their liberty without due process of law in denying their applications to intervene in this action.

(2) Whether petitioners, potential voters and candidates for nomination in the New Mexico primary, have standing to invoke the jurisdiction of this Court to review the judgment below which upheld the state requirement of filing fees.

(3) Whether the filing fees for primary candidates required by §3-8-26(A) New Mexico Statutes Annotated are constitutional.

Statement of the Case

The statement of the case is set out in the Jurisdictional Statement filed this day in *Norvell* v. *New Mexico ex rel. Apodaca*, pp. 3-9, No. 71- ——.

At this point petitioners would simply add that they are both candidates for nomination by primary, who have been barred from the ballot for failure to pay New Mexico's substantial filing fees, and their supporters who are voters in New Mexico. They were all denied the right to intervene in the proceedings below which found those fees constitutional. They contend that the denial of intervention deprived them of their liberty without due process of law, that they have standing to challenge the filing fee requirements in this Court, and that those requirements are unconstitutional.

How the Federal Questions Were Raised

The first question, whether the Constitution required the Court below to allow petitioners to intervene, was raised in petitioners' motions to intervene. Each motion specified that petitioners would be deprived of their liberty without due process of law if the Court denied the motion.

The second question, whether petitioners have standing to seek review of the final judgment of the Court below in *New Mexico ex rel. Apodaca* v. *Fiorina*, concerning the constitutionality of New Mexico's filing fees, is one concerning the jurisdiction of this Court and need not—and could not—have been raised below.

The third question, whether New Mexico's system of filing fees in primary elections is constitutional, was raised in the response of the Secretary of State and the Attorney General to the writ of mandamus in the Court below.

Reasons for Granting the Writ

The following significant questions are presented in this petition for writ of certiorari. To deal with these issues the Court should take jurisdiction and review the decision of the Court below.

I.

The Court should determine whether petitioners were deprived of due process of law by being excluded from the proceeding below.

It is a basic principle of Anglo-American jurisprudence that "no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court." *Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 194, 198.

Although few courts have clearly passed on the point—presumably because the principle is so deeply imbedded in our jurisprudence that it is rarely violated—commentators and courts recognize that a failure to protect those not before the Court may rise to the level of a deprivation of due process "should the judgment in the action have the effect of destroying their rights." 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §1602 at p. 20; *Britton* v. *Green*, 325 F.2d 377, 382 (10th Cir. 1963); *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 224 (5th Cir.), *cert. denied* 329 U.S. 782 (1946); *Osborne* v. *Campbell*, 37 F.R.D. 339, 342 (D.W.Va. 1965); *cf.* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 368 (1967); MOORE'S FEDERAL PRACTICE ¶19.01-1[2]. Thus *Shields* v. *Barrow*, 58 U.S. (17 How.) 130 (1855), the case out of which the modern notion of an indispensable party, now codified in Rule 19 of the Federal Rules of Civil Procedure, arose, spoke in a manner that seemed grounded in fundamental notions of due process. There, in affirming the decision of the trial court to dismiss an action to set aside a compromise of an action

because all parties to the compromise were not before the court, the Supreme Court said that a trial court

> can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights.

In more recent times the existence of codified rules of procedure in both federal and state courts which provide for the joinder or intervention of affected third parties have rendered the constitutional right to intervention a relatively unlitigated matter. See C. WRIGHT & A. MILLER, *supra*, §1602. Yet recently this Court had occasion to note that the issue remained an open one and that the Court was aware of its existence. In ruling that a person whose interests "may be affected" is not an indispensable party within the meaning of Rule 19 of the Federal Rules of Civil Procedure, the Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 123 (1968) stated

> [n]either Rule 19, nor we today, mean to foreclose an examination in future cases to see whether an injustice is being, or might be, done to the substantive, or, for that matter, constitutional, rights of an outsider by proceeding with a particular case.

In at least two cases the Court has implicitly ruled that there is a constitutional dimension to the joinder of parties. In *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961), Pennsylvania had proceeded in state court against Western Union to claim certain long-unpaid money orders and drafts under its escheat powers; Western Union

showed that the obligations in question had been in part escheated to New York. The Court reasoned that since the widespread activities of Western Union and proliferating state escheat laws could subject Western Union to suit in virtually every state in the Union, no single state could escheat the funds to itself without providing a forum where all claimants could be heard. Since Pennsylvania could not provide such a forum, it ought to have dismissed the action. Similarly the Court reasoned in *Hanson* v. *Denckla*, 357 U.S. 235 (1958), that a state could not take jurisdiction over the body of a trust where neither the trustee nor any beneficiaries with an interest adverse to the complainants were before the court. The court noted in passing that the clearest violations of due process were in those cases where

> the court failed to employ a means of notice reasonably calculated to inform nonresident defendants of the pending proceedings, or denied them an opportunity to be heard in defense of their interests. 357 U.S. at 245. [Footnotes omitted]

In this case, the court not only failed to give any notice to the affected parties—contrary to its own rules—but also refused, without explanation, to permit them to join in the action.

The reason why each affected party should, where feasible, have his day in court is simple: only the party affected can clearly perceive his own interest, and thus only he can adequately protect it in a trial. It is particularly important in cases involving an extraordinary writ against public officials that those directly affected be notified of the action and permitted to intervene. Public officials may well be simply stakeholders of the public weal with no real in-

terest in the outcome of the lawsuit, and they may thus be particularly ill-suited to proceed in an adversary fashion. See *Smith* v. *Indiana*, 191 U.S. 138, 148 (1903); *Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405 (1900). Because of this lack of true adversaries, there is a greater possibility for collusive and fraudulent lawsuits in this type of litigation than in any other type. Of course there is some argument for only permitting public officials to litigate cases involving public issues because the number of involved persons may be too great to join or to give notice to. Such, however, was not the case here. The class directly affected by this lawsuit was those persons who had filed without fee. The number was not large and the court was aware of who those persons were.[1]

Often in issues of public importance the failure to join directly affected parties is ameliorated by the fact that they can litigate a lawsuit of their own to protect their interests. But that is not the case here. The New Mexico judgment is, if not immediately reversed, a final decision on the merits; there is no time prior to the June 6 primary to relitigate the issue. The New Mexico Court must have been aware that, as a practical matter, its judgment was the last available prior to the election—save the possibility of review by this Court.

That makes particularly important the fact that the normal litigant's right of appeal might be totally lost by the action of the New Mexico Court. Had petitioners been allowed to intervene, it is clear that they would have had a right to appeal to this Court. See *United States* v. *Allegheny County, Pa.*, 322 U.S. 174, 191-92 (1944); 28 U.S.C.

[1] The court had before it, in evidence, a list of all who had filed for each political office in the primary; the list indicated which ones had and had not paid the filing fee.

§1257(2). And their interest in the matter made it likely that they would pursue such an appeal with vigor and dispatch. Not so, however, with the nominal parties Fiorina and Norvell. Their personal interest was not so directly affected that they would, despite local political pressure, take an immediate appeal to this Court. Mrs. Fiorina, perhaps predictably, has stated that she has no desire to appeal the judgment below even though it is she who is most directly affected by the writ of mandamus and even though she is presently in violation of that order by permitting all Senatorial candidates to file, irrespective of payment of the filing fee.[2] See *Northern Indiana R. Co.* v. *Michigan Central R. Co.*, 56 U.S. (15 How.) 233 (indispensability where there was a possibility of conflicting injunctions).

The action of the New Mexico State Court in refusing to permit intervention had the effect of insuring that only the parties least likely to appeal would be before the Court.

II.

The Court should determine whether petitioners have standing to invoke this Court's jurisdiction to review the New Mexico Supreme Court's decision on the constitutionality of New Mexico's statutory filing fees.

It has been said that the power of judicial review in the Supreme Court most essential to federalism is that exercised over the decisions of state legislatures. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). If that is true, then this Court has special need to accord standing

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[2] Although Mrs. Fiorina's action in allowing all Senatorial candidates to file without fee eliminated appellant Norvell's personal interest in the litigation, he is nonetheless bringing an appeal, filed today, *Norvell* v. *New Mexico ex rel. Apodaca*, No. 71- ——.

to petitioners to challenge the final judgment of the Court below regarding the constitutionality of New Mexico's filing fees. Here the Court faces a case where the state court in question has done its utmost to insulate from review its final decision upholding the validity, under the federal constitution, of the filing fee required in its election law.[3] It has gone to final judgment against nominal parties, public officials, while without reason excluding from the proceeding the very persons whose rights were being litigated. It is essential that either petitioners here or the Attorney General in his appeal have standing to challenge the merits of that suit before this Court, otherwise litigants will be free to bring suits such as these in order to obtain unreviewable judgments upholding suspect state statutes, insulated from this Court's scrutiny.

As we have argued in Point I above, petitioners were denied due process of law when the court below refused to allow them to intervene in the action then about to commence. That being the case, petitioners ought to be able to raise the merits of the controversy here.[4] They are all

[3] The intent of the New Mexico Supreme Court is most clearly shown in exempting from its final order the three plaintiffs in the *Dillon* suit. Had they not been exempted, then, on that basis they could have sought review of the decision either by appeal from the decision of the three-judge court or by an extraordinary writ from this Court under 28 U.S.C. §1651. See *United States* v. *Haley*, 371 U.S. 18 (1962).

[4] While under normal circumstances the preferable procedure might have been to seek review of the intervention issue and, then in the event of a favorable decision in this Court, return to the state court as intervenors. The expedited schedule of this case in the Supreme Court of New Mexico did not permit such a procedure. The normal return time on a writ of mandamus in that court is ten days. Rule 24(3), Rules of the Supreme Court of New Mexico; 21-2-1(29) N.M.S.A. In this case the court below reduced that time to five days. Petitioners were able to seek intervention only moments before the hearing began; it would not have been possible for this

parties directly affected by the ruling below; Petitioners Brown and O'Hearn will not be able to run for party nominations; petitioners Young and Cinelli will not be able to vote for them.[5] The personal interest that these parties have is much greater than that of either the Secretary of State or the Attorney General.[6] Moreover, if the court decides that adjudication of the action below without permitting petitioners to intervene deprived petitioners of liberty without due process of law, it would be somewhat anomalous then to decide that petitioners cannot appeal the merits because they were not parties below.

III.

The Court should determine whether New Mexico's statutory filing fee arrangement is unconstitutional under the doctrine of *Bullock* v. *Carter*.

For the arguments under this section, the Court is respectfully referred to Point II in the Jurisdictional Statement filed this day in *Norvell* v. *New Mexico ex rel. Apodaca*, pp. 12-26.

Court to act fast enough for the petitioners to join in the hearing as intervening parties.

[5] In analogous federal cases, the courts have had no problem in deciding that both voters and candidates had standing to object to unconstitutional filing fees. *Jenness* v. *Little*, 306 F. Supp. 925, 927 (N.D. Ga. 1969), *appeal dismissed as moot*, 397 U.S. 94 (1970); *Georgia Socialist Workers Party* v. *Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970), *aff'd on other grounds sub nom. Jenness* v. *Fortson*, 403 U.S. 431 (1971); *Carter* v. *Dies*, 321 F. Supp. 1358 (N.D. Tex. 1970), *aff'd sub nom. Bullock* v. *Carter*, 40 U.S.L.W. 4211 (U.S. Sup. Ct. Feb. 24, 1972).

[6] It may even be that neither of them could even bring an appeal in this court, see *Smith* v. *Indiana*, 191 U.S. 138, 148 (1903); *Tyler* v. *Judges of Court of Registration*, 179 U.S. 405 (1900). *But see* Point I in the Jurisdictional Statement in *Norvell* v. *New Mexico ex rel. Apodaca*, No. 71- ——, filed this day pp. 10-12.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

May , 1972

APPENDIX

Orders of the Supreme Court of the State of New Mexico Denying Intervention

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, April 13, 1972

No. 9454

STATE OF NEW MEXICO, *ex rel.* A. L. HAPPY APODACA and A. L. HAPPY APODACA,

Relator,

vs.

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,

Respondents.

ORIGINAL MANDAMUS PROCEEDING

This matter coming on for consideration by the Court upon motion of Terry Brown to intervene in the above entitled cause, and the Court having considered said motion and being sufficiently advised in the premises;

IT IS ORDERED that motion of Terry Brown to intervene in the above entitled cause be and the same is hereby denied.

ATTEST: A True Copy

ROSE MARIE ALDERITE
Clerk of the Supreme Court
of the State of New Mexico

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, April 13, 1972

No. 9454

STATE OF NEW MEXICO, *ex rel.* A. L. HAPPY APODACA and A. L. HAPPY APODACA,

Relator,

vs.

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,

Respondents.

ORIGINAL MANDAMUS PROCEEDING

This matter coming on for consideration by the Court upon motion of Arlene Cinelli to intervene in the above entitled cause, and the Court having considered said motion and being sufficiently advised in the premises;

IT IS ORDERED that motion of Arlene Cinelli to intervene in the above entitled cause be and the same is hereby denied.

ATTEST: A True Copy

ROSE MARIE ALDERITE
Clerk of the Supreme Court
of the State of New Mexico

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, April 13, 1972

No. 9454

STATE OF NEW MEXICO, *ex rel.* A. L. HAPPY APODACA and A. L. HAPPY APODACA,

Relator,

vs.

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,

Respondents.

ORIGINAL MANDAMUS PROCEEDING

This matter coming on for consideration by the Court upon motion of Patrick O'Hearn to intervene in the above entitled cause, and the Court having considered said motion and being sufficiently advised in the premises;

IT IS ORDERED that motion of Patrick O'Hearn to intervent in the above entitled cause be and the same is hereby denied.

ATTEST: A True Copy

ROSE MARIE ALDERITE
Clerk of the Supreme Court
of the State of New Mexico

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, April 13, 1972

No. 9454

STATE OF NEW MEXICO, *ex rel.* A. L. HAPPY APODACA and A. L. HAPPY APODACA,

Relator,

vs.

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,

Respondents.

ORIGINAL MANDAMUS PROCEEDING

This matter coming on for consideration by the Court upon motion of Robert R. Young to intervene in the above entitled cause, and the Court having considered said motion and being sufficiently advised in the premises;

IT IS ORDERED that motion of Robert R. Young to intervene in the above entitled cause be and the same is hereby denied.

ATTEST: A True Copy

ROSE MARIE ALDERITE
Clerk of the Supreme Court
of the State of New Mexico

Petitioners' Notice of Appeal

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

No. 9454

STATE OF NEW MEXICO, *ex rel.* A. L. HAPPY APODACA, and A. L. HAPPY APODACA,

Relators,

—vs.—

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,

Respondents.

Notice is hereby given that Terry Brown, Patrick O'Hearn, Arlene Cinelli, and Bob Young, Petitioners to intervene as of right, hereby appeal to the Supreme Court of the United States from (I) the final order and judgment of the Supreme Court of the State of New Mexico denying Petitioners' application and motion to intervene as of right (§21-1-1(24)(a), N. M. Stat. Ann. 1953 (Repl. 1970)) entered in the above-styled and abo e-numbered cause as against Petitioners to intervene as of right named in this Notice on April 18, 1972, and (II) from the final order and judgment of the Supreme Court of the State of New Mexico as against David Norvell and Betty Fiorina, Respondents, requiring Respondent Betty Fiorina to omit the names of third-party intervenors Terry Brown and Patrick

O'Hearn from the official primary election ballot of the State of New Mexico at 5:00 p.m., April 21, 1972, unless Petitioners to intervene as of right Terry Brown and Patrick O'Hearn comply with the provisions of §3-8-26(A), N. M. Stat. Ann. 1953 (Repl. 1970), requiring Petitioners to Intervene as of Right Brown and O'Hearn to pay certain filing fees for elective office, by that time and date entered in the above-styled and above-numbered cause as against Respondents named in this Notice on April 17, 1972. This Appeal is taken pursuant to 28 U.S.C., §1257(2).

Dated this 18th day of April, 1972.

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